United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7329

To be argued by:
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs-Appellees,

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Defendant-Appellant.

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P/S

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs-Appellees,

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Defendant-Appellant.

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BRIEF FOR APPELLANT

Question Presented

Whether ERISA § 514 precludes the New York State Insurance Department from inquiring on behalf of a beneficiary of the plaintiffs trustees' pension fund regarding credits claimed to have been earned prior to January 1, 1975 and, if necessary, take action against them under N.Y. Insurance Law, Art 3-A?

Statute Construed

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. et seq., provides in pertinent part:

> § 514(a) [29 U.S.C. § 1144(a)] "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975."
>
> § 514(b)[29 U.S.C. § 1144(b)] "(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975."
>
> "(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."
>
> (B) "Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b)(other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other isurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate companies, insurance contracts, banks, trust companies, or investment companies."

Statement of the Case

This is an appeal from a judgment of the United States District Court, Southern District of New York (Hon. Charles M. Metzner, J.) entered July 16, 1976, declaring that the New York State Insurance Department was preempted by Section 514 of ERISA from assuming any jurisdiction over an inquiry dated March 24, 1975, by a beneficiary of plaintiffs' pension fund concerning pension credits claimed to have been earned prior to January 1, 1975, and restraining the Insurance Department from further pursuit of this inquiry and from the institution of any civil or criminal proceeding arising therefrom (65 a).*

This action arose out of an attempt by the New York State Insurance Department, acting under N.Y. Insurance Law, Art. 3-A, to answer an inquiry by a Mr. Seymour Eskowitz who desired information as to whether he should have been credited with a year's employment while a member of another teamsters local union. A copy of his letter dated March 24, 1975 is attached to defendant's Rule 9(g) statement as Exhibit "A"(50 a).

Unfortunately, the fund's trustees' (plaintiffs') response to the Insurance Department's inquiries was an obstinate refusal to cooperate or to assist its member. Claiming that the

* Numbers in parenthesis followed by "a" refer to pages of the appendix.

Insurance Department lacked jurisdiction because of a preemption by ERISA § 514, the trustees instituted the present action.

The State did not deny that ERISA preempts it as to any matters arising after January 1, 1975. Rather the dispute concerns the scope of the State's residual jurisdiction over pension funds.

The District Court held that this residual jurisdiction could not be based solely upon the fact that pension credits were accumulated prior to January 1, 1975; that in the instant case, there had been no showing of an act or omission occuring prior to January 1, 1975, but that, in the District Court's view, the Insurance Department was attempting to investigate the present status of the complainant (63a). Noting that ERISA provided for comprehensive federal supervision of pension funds and for remedies to protect beneficiaries aggrieved by acts of the funds' trustees, the Court held that allowing State jurisdiction would create confusion in this area of the law and defeat the purpose of the Federal statute (62-3a).

ARGUMENT

THE STATE OF NEW YORK RETAINS JURISDICTION TO PURSUE INQUIRIES AND TAKE ACTION RELATING TO RETIREMENT CREDITS EARNED PRIOR TO JANUARY 1, 1975

A.

A careful examination of the District Court's opinion shows it to be founded upon a non sequitur: that the undisputed subject matter preemption of ERISA also prevents the states from acting upon all but those complaints alleging breaches of duty to a fund beneficiary occuring prior to January 1, 1975, that had been lodged with the State prior thereto. Not only is this logically falacious, but is legally erroneous as well.

No one claims that the earning of pension credits constitutes a "cause of action" or an "act or omission" within the meaning of § 514(b). It is a fund's breach of duty to a member owed benefits on account of such credit that gives rise to a cause of action and comes within the definition of an "act or omission."

In the instant case, it is not even clear whether the trustees' conduct has given rise to a cause of action by reason of their acts or omissions prior to January 1, 1975. However, their "stonewalling"; their obstinate refusal to give any

information (as if they, in fact, had something to hide) makes such a determination impossible at this time. Of course, if the trustees had breached their duty, the ability of the Insurance Department to enforce N.Y. Insurance Law § 37-1(7) would not be without limit. It would be subject to a six year statute of limitations, which, in the case of a claim sounding in fraud would be deemed to have occurred from the time when discovered or when it could have been discovered with reasonable diligence, NYCPLR § 213(1)(8). In Runyon v. McCrary, ____U.S.____, 49 L. ed 2d 415, 430-432 (1976) the Supreme Court held that specific state statutes of limitations for analagous causes of action were to be followed in federal cases under the Civil Rights Laws, e.g. 42 U.S.C. § 1983. Thus the Court has insisted that state law be followed in determining when an action is deemed to have arisen and the period in which it may be prosecuted.

The rationale of avoiding subjecting fund trustees to more than one jurisdiction, so uncritically adopted by the District Court, cannot be achieved in any event. Congress expressly reserved to the states their criminal law jurisdiction, ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4). Thus any breach of duty by the trustees constituting a crime (e.g. fraud, embezzlement) could still be prosecuted within the period of the statute of limitations, NYCPL § 30.10. Thus the provision of the final judgment prohibiting any criminal proceedings is erroneous on its face. Furthermore this jurisdiction would be

frustrated if, as in the instant case, a state is prohibited from making a preliminary inquiry as to the facts.

B.

In any event, the legislative history relied upon by plaintiffs in the Court below, memo in support of motion for sum. jt. pp. 24-27 does not support their case.* It is not disputed that ERISA was desinged to achieve uniform regulation of pension plans. However, plaintiff has not cited any legislative history to indicate that the Act was not to be anything but propective in its operations, leaving to the States control over anything occurring prior to January 1, 1975, even after that date, see e.g., Fisher v. Howe Indemnity Co., 198 F. 2d 218, 222 (5th Cir., 1952). If anythin, the act itself recognizes that this is a complicated area of the law, requiring re-exaimination of the act and the manner of its operation, including the pre-emption of state laws, 29 U.S.C. §§ 1221, 1222. To that end, the statute provides for a congressional task force composed of committee staff members, which was directed to report to the appropriate committees by September 2, 1976, id. § 1222(a). As part of the input into work of this task force, designed to assist the Congress in determining the need for amendments to the act, a subcommittee of the National Association of Insurance Commissioners recently urged

* One of their references to legislative history, deals not with the scope of preemption but with the substantive exemption from covera , [1974] 3 U.S. Code Cong. & adm. News p. 4854.

major revisions in the scope of federal pre-emption, NAIC Statement on Federal Preemption of Insurance Regulation Under Section 514 of ERISA (July 21, 1976). In examining the Legislative history of ERISA, it pointed out that there was serious doubt as to the actual intent of Congress to preempt the States from regulating the conduct of welfare fund trustees, id. p. 48. et seq.

Congress has refused to preempt the states from the regulation of the insurance industry, see McCarran-Ferguson Act, PL 15, 59 Stat 33-34 (1945) which overruled the Supreme Court in United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944). This policy is carried into ERISA, itself, see § 514(b)(2)(A)(B). In view of the expressed intent of Congress, the District Court should not have taken upon itself to oust the State of New York from its long-established role as a protector of pension and welfare fund beneficiaries, which, even after ERISA, remains intact within the relatively narrow time frame preserved by Congress, § 514(b)(1); Cf. New York State Department of Social Services v. Dublino, 413 U.S. 405, 413 (1973).

C.

Finally, in determining the scope of the State's residual jurisdiction over employee pension plans it is most significant that the U.S. Department of Labor, with knowledge of the State Insurance Department's practices and with specific

knowledge of the instant case has refused to interfere in the present matter. See letter from Department of Labor, Solicitor's office dated October 23, 1975, annexed as Exhibit "B" to defendants' 9(g) statement (53a).

It would appear, therefore, that the Department of Labor has come to what is, at least a tentative conclusion, that the State is not violating ERISA's preemption section [§ 514(a)]. As the agency responsible for enforcing ERISA, its apparent views should be given weight by this Court, particularly in the absence of any reported federal judicial interpretation of § 514(a)(b). See e.g., Zuber v. Allen, 396 U.S. 168, 192 (1969); Udall v. Tallman, 380 U.S. 1, 16-17 (1965). In what appears to be the only reported state case interpreting § 514(a), In re Sommers, 126 Cal. Rptr. 220, 224 (Cal. App. 1975), the court upheld State jurisdiction relating to credits earned prior to 1975.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED AND THE COMPLAINT DISMISSED

Dated: New York, New York
September 27, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of the Attorney General of the State of New York, attorney for appellant herein. On the 27th day of September, 1976, he served the annexed upon the following named persons:

COHEN, WEISS & SIMON
Attorneys for Appellees
605 Third Avenue
New York, N. Y. 10016

Attorneys in the within entitled appeal by depositing 3 true and correct copies thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at 90 Church Street, New York, New York 10007, directed to said Attorneys at the address within the State designated by them for that purpose.

Robert S. Hammer

ROBERT S. HAMMER

Sworn to before me this
28th day of September, 1976

Murray Sylvester

Assistant Attorney General
of the State of New York
MURRAY SYLVESTER